

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of: Gross)	Art Unit: 3689
)	
Serial No.: 10/771094)	<u>Examiner: Ruhl, Dennis William</u>
)	
Filed: 02/2/2004)	
)	
For: <i>Media Queue Replenisher</i>)	

Reply Brief

Mail Stop Appeal Brief - Patents
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Reply to ¶ 2 – GROUNDS FOR REJECTION UNDER §101

The arguments in the Examiner's Answer appear to be identical to those set out in the Final Office Action, which points are already addressed in the Appeal Brief.

Reply to ¶ 3 - 4 GROUNDS FOR REJECTION UNDER §103

The arguments in the Examiner's Answer appear to be identical to those set out in the Final Office Action, which points are already addressed in the Appeal Brief.

Reply to ¶ 10 – EXAMINER’S RESPONSE

- Reply to Examiner Contention Regarding Propriety of Exhibits: The Examiner Continues to Rely on Inferior Secondary Evidence Concerning the Details of the Acid Rain Program

The Examiner’s argument about the use of new exhibits is not well taken for several reasons. First, the Examiner suggests that the claims were amended to recite features not previously claimed, which he asserts necessitated his citation of the Acid Rain NPL articles. That may be true, but it does not close the door on the question of whether the Examiner’s evidence for the Acid Rain program – which he cited for the first time in the Final Office Action – is complete, accurate, or challengeable on the merits.

The Examiner here chose to rely on secondary materials (an article about the Acid Rain program) rather than more complete information set out in the program itself (from the EPA) identifying how it worked. Under the Federal Rules of Evidence (see e.g., FRE 1002) secondary evidence is disfavored in lieu of original materials comprising content to be reviewed. Since the Examiner placed (and relies upon) the substance of the Acid Rain program in his contention, he cannot complain now about the submission of more complete and accurate information detailing the specifics of such program.

For this reason Applicant submitted actual language from the Acid Rain program (including directly from the EPA website) for the Honorable Board’s review, so that it could have a complete and accurate understanding of the program, and not simply that presented through the lens of a third party commentator. As the Board can see, the Examiner makes no effort to deny that he relied on the incomplete information about the Acid Rain program, rather than the complete information presented by the Applicant. See Answer page 14: “...these documents are not what the Examiner relied upon to reject the claims.” This by itself renders the rejection suspect, since the Examiner admits that he using secondary evidence, rather than the best evidence from the EPA documenting the substance of the program.

Nor does the Examiner ever address the best evidence exhibits (including Exhibit 2 taken directly from the EPA website) provided by the Applicant to rebut the points

made by Applicant concerning the actual parameters of that program. Instead, time and time again the Examiner repeats his reliance on the secondary evidence as he interprets it from the Acid Rain article he cited earlier. On this basis alone Applicant submits that the rejection is improper because the Examiner is clearly not relying on appropriate evidence of the parameters of the Acid Rain program, but, rather, secondary evidence that is at best incomplete and inconsistent with the actual program as set out in the exhibits provided by the Applicant.

- **The Examiner's Argument On the Acid Rain Program Is Wrong On The Merits As Evidenced By Applicant's Submission**

The main flaw in the Examiner's argument is that he again relies on broad brush arguments without considering the actual language of the claims. For example, the Examiner states:

"The essence of what is claimed here is the concept of reducing one capacity and increasing a second capacity (for two separate users)." See Answer page 15.

Yet this is not what the claim states. Rather this is apparently the distilled version that the Examiner chose to consider¹ when he cited the Acid Rain Program. The claim in fact states:

....said first user can ***selectively allocate his/her capacity*** for receiving playable media items ***to a second user***

In all of his discussion of the Acid Rain Program, the Examiner attempts to rely on marginal/exception conditions where he effectively suggests that the above limitation *might* be possible.² In his first scenario, he implies that because a user A *might* be able to obtain capacity from another user B by successfully winning an auction, that this

¹ Later again the Examiner again makes a similar off-hand observation that "...the claims limitation in question simply recites the broad concept of reducing the capacity of one user, and increasing the capacity of another in an environment where the total capacity is capped at some level." This argument again misses the mark because the Examiner is apparently not addressing the actual claim language, but rather, his own subjective interpretation of their coverage.

² The Examiner also continually mis-states the language as "selectively **transfer**" when it can be seen that it in fact states "selectively **allocate**." Even this slight linguistic alteration is important since the **Acid Rain** program "transfers" were irrevocable – meaning, the entity that transferred an allowance lost it - it could not get it back until another auction cycle. Here, as the present specification explains, users can "allocate" capacity, an operation which does not necessarily result in a loss of such capacity by the user; rather it is merely allocated to another, including for temporary use.

could meet the claim language. But the Examiner fails to explain how user B's putting up allowances for auction could constitute **selectively allocating** their capacity to user A. As the Honorable Board can see from the details of the program, the winner of the auction in the EPA program could be anyone; thus, user B could not "selectively" allocate anything to another participant, including user A.³

Again, too, the issue is not whether the claims cover an auction or not, or some theoretical auction whose parameters the Examiner can envision. The argument made by the Applicant is that it is clear in the EPA Acid Rain program that the type of auction identified *there* does not teach the language of limitation (f) of claim 1.

This point is not rebutted by the Examiner, as he seems to be suggesting (on page 17) that it is possible that some auction somewhere at sometime may be germane to the pending claim. For example he states:

"...if the user decides to sell some allowances, they have decided (selected) to sell a certain number at auction, which satisfies what is claimed."

This is both inapt and irrelevant to the claims. First, it is irrelevant, since the claim says nothing about "selling" anything. Second, it is inapt because again the Examiner does not cite the language of the claim (selectively allocating) but, rather argues about a different term – "selected." The two are clearly not equivalent in this context. When a participant in the Acid Rain program "selects" to sell an allowance that entity has no control over the disposition of capacity; this is not the same as "selectively allocating capacity" to another user. The Acid Rain program participant has no control, let alone "selective" control of who gets an allowance.

³ Applicant pointed out several other restrictions in the program, all of which made it nigh impossible for users to "selectively allocate" their capacity, including the restrictions on absolute emissions imposed by the EPA. A user could not "selectively transfer" an allowance for example to an entity that was already over the limit. Rather than address this inherent deficiency in the Acid Rain Program, the Examiner merely states that he did not rely on this evidence (see top of page 16). But the Examiner cannot simply pick and choose which elements of the program he decides are favorable, while ignoring the teachings of the reference as a whole.

In sum, Applicant submits that the Examiner has clearly ignored the term “selectively” in the claim, and instead has fixated on whether the prior art shows that it is *ever* possible for capacity to be exchanged between two entities. Yet the key feature of the claims allows for a specific user to allocate their capacity to another specific user, a fact that simply does not occur and is not suggested in the prior art Acid Rain article relied upon by the Examiner.

Finally, on page 18 the Examiner cites to the Applicant’s disclosure to support his argument that it also discloses an auction system, and thus the Acid Rain Program is relevant for that reason. This again is an argument that fails to address the language of the claims at issue here. Applicant’s disclosure does indeed discuss auction embodiments, but that does not make the EPA Acid Rain Program necessarily relevant to the subject matter of the claims pending in this application. The “auction” component referred to here in the specification also is not referring to auctions of *capacity*, but, rather, auctions of specific *titles* that the user may wish to see. For example user A may offer an item X for auction, and that item may be obtained by user B. This type of activity has no effect on each user’s capacity however.

- **The Examiner Does Not Address the Main Contentions on Non-Analogous Art**

For the most part the Examiner’s arguments on the applicability of the Acid Rain program materials consist substantially of speculation, conjecture and subjective interpretation. The entire discussion from page 18 to middle of page 19 does not even attempt to address the fundamental deficiencies noted by the Applicant in the appeal brief.

Two separate tests define the scope of analogous prior art: (1) whether the art is from the same field of endeavor, regardless of the problem addressed, and (2) if the reference is not within the field of the inventor's endeavor, whether the reference still is reasonably pertinent to the particular problem with which the inventor is involved. In re Bigio, 381 F.3d 1320, 1325 (Fed. Cir. 2004). The Examiner does not contend that the Acid Rain Program materials are from the same field of art. Nor does he provide any evidence that one skilled in the art in the instant field of art would have looked to such

program to solve the problems addressed in the current claims. In fact as noted in the exhibit provided by Applicant, apparently not a single one of thousands of relevant cases have ever mentioned, let alone considered the teachings of the Acid Rain program as germane to inventions in this field. Absent setting forth evidence on these points, Applicant submits that the Examiner has not met the threshold requirement for analogous prior art as set out above.

Similarly, while continue to rely on some poorly defined “leave donation” program as a secondary argument, the Examiner fails to rebut any of the points made by the Applicant on pages 17 – 18 of the Appeal Brief. The Examiner cannot demonstrate any person skilled in the art would ever consider the type of program he is envisioning (and which requires speculation to determine the parameters⁴) for Hastings, as the two types of systems are inherently different and are motivated by different dynamics.

Moreover the Examiner’s argument that at the end of the year the employee loses excessive capacity in a leave program does not alter the fact that, as the Applicant noted, there is no leave limit at any moment in time in such programs. In the scenario identified by the Examiner, the employee can still have 241 or even 300 days of leave on any day between January 1 and December 31, even if the “carry-over” amount between years is only 240. All that happens is that the capacity is adjusted during the transitions and is not “carried over” as the Examiner states. Modifying Hastings to behave this way (effectively having infinite capacity that is adjusted during cycles) clearly does not result in the claimed invention.

The other main point of the Examiner’s argument is something he oft relies upon and repeatedly refers to as a “cap and trade system” – again, with little or no evidence or support for the parameters of such alleged system. Moreover the arguments set forth by the Examiner consist almost entirely of his own subjective “feelings” and “opinions” and very little – if any - evidence to support the rejections. Here the Examiner states (emphasis added):

⁴ The vagueness in the boundaries of the “leave program” are further illuminated by the new restrictions which the Examiner now identifies for the first time in the Answer, on pages 21 – 22. This passage points out dramatically why the Examiner should have cited to a real reference in the first place, as opposed to a hypothetical, speculative program with ever changing parameters.

The **Examiner is very concerned that this issue will be viewed** as simply taking the idea of a cap and trade system and applying that to the Hastings medial rental system where the month number of movies one can receive is already disclosed as being capped. In view of KSR, **the Examiner strongly feels** that applicant has basically adopted the concept of a cap and trade system and applied it to Hastings, which already caps the monthly movies for each user. ... **Applicant, in the opinion of the examiner**, has simply adopted this idea from the basic concept of what a cap and trade system is. The **examiner does not feel** that adding the ability to transfer unused movie rentals in Hastings, where the number of movies is already capped, amounts to anything more than adopting the cap and trade concept to Hastings.

Applicant submits that the bulk of the Examiner's argument here consists primarily of subjective personal opinion that is not tied to any evidence, but instead is intended to evoke some kind of irrational emotional reaction. It is hard to understand how or why the Examiner is "concerned" about how the issues here are going to be viewed for example, a point which seems tangential at best to the purpose and function of these proceedings.

Consequently the Examiner certainly repeats and makes clear his personal "concern" and "feelings" about the scope of the claims. But as the Honorable Board can see, other than his subjective personal feelings, the Examiner does not cite a whole lot of evidence, except to repeat an assertion that this is a "cap and trade" system. Again, Applicant pointed out in the Appeal brief that despite the Examiner's contention, the famous/well-known "cap and trade" system he refers to is nowhere to be found in thousands of cases examined in this area. All objective evidence, therefore, suggests the Examiner's impressions of the utility or perception of the Acid Rain program to computer artisans are off by a significant order of magnitude.

- **The Examiner Does Not Rebutt Appellant's Showing That Hastings, Modified by Acid Rain, Does Not Result in the Claimed Invention**

Notably the Examiner does not address Applicant's contentions that the proposed combination of Hastings and the Acid Rain Program does not even result in the system he envisions, because both references have clear limitations which the Examiner ignored and does not attempt to reconcile. To wit, the Applicant pointed out that the Acid Rain program does not constrain the capacity of the participants at any

moment in time – rather, it only considers how much was used at the end of the year when it determines how much the participant has used. The Auction is used to retroactively cure any excess usage – the use of this kind of “trade” within Hastings therefore would mean that it would simply ship the user all the movies they wanted, and then check at the end of the applicable period to see if they had exceeded their yearly allotment. The users could then presumably buy additional capacity from other users in an auction as taught by the Acid Rain program. This, however, is not disclosing what is claimed here.

As Hastings already describes a MAX TURNS solution (i.e., receiving a certain number of titles within a predefined period) any teaching or suggestion by Acid Rain therefore would at most lead a person skilled in the art to receive an increase in the MAX TURNS at the *end* of the billing cycle in the Hastings reference, not in the MAX OUT feature which controls the number of titles (capacity) that the user can have out. The “capacity” transfer procedure in Acid Rain – which allows for effectively any capacity whatsoever - is fundamentally at odds with the Hastings “capacity” feature controlling how many titles they have out.

In addition, as pointed out by Applicant, the Examiner’s proposed modification of Hastings is incompatible with the goals of that reference. See page 15. This point is not contradicted by the Examiner and belies the obviousness of the proposed combination.

- **The Rejection Of The Remainder of the Claims Is In Error**

For claim 6, the Examiner continues to rely on a distorted and convoluted definition of the term “predefined time delay” :

...the subscriber delivery first user selection queue *is automatically modified* in accordance with said queue replenishment control rules *after a predefined time delay*.

The Examiner states that the user does not control the predefined time delay; this is incorrect, since claim 6 indicates that the queue is automatically modified after such delay by the queue replenishment control rules, which, as claim 1 notes, are provided at least in part by the user. The specification similarly supports this interpretation, as seen in reference numeral 230 (FIG. 2) which allows the user to

predefine how many days of delay they wish. Thus, this fundamental point is missed by the Examiner.

The second argument, that somehow any random collection of hardware and software will always yield a “predefined” time delay is fallacious on its face. By the Examiner’s own logic, there will rarely be a case where the same combination of systems/software with its unique inherent delays will ever be used. Accordingly it will never be possible to “predefine” a time delay using only the random inherent delays relied on by the Examiner, because it will always result in a different time.

As concerns claim 9, the Examiner again makes no effort to contradict the fact that the term “recommender” has a well-known meaning, and yet Hastings does not show any such type of structure. Instead the Examiner argues that since Hastings is talking about the Netflix rental system, and the latter now has implemented a recommender system, then Hastings must have one too. The Examiner here fails to note, however, that the reference he applies (Hastings) was filed many years before the Netflix system discussed at length in the Background of the Invention. The Examiner could have - but did not cite to the Netflix system - and tried to make a case of obviousness based on that reference. Instead he pinned his arguments entirely on the Hastings reference, which, as set out in the Appeal Brief, does not disclose the claimed recommender system. The Netflix system cannot rectify the underlying deficiencies in the Hastings reference.

For claim 12: the Examiner does not dispute that the reference does not show the preference routine and selection queue being located at different websites. He merely again states that he thinks the term “operable” doesn’t mean that the preference routine must be operated. Assuming arguendo that this interpretation is correct (which Applicant disputes) that does not change the fact that claim states that the two have to be situated at different websites, even under the interpretation used by the Examiner. Since the Examiner does not cite any evidence to meet this limitation, the rejection must be reversed.

For claim 8: the Examiner's own citation shows that Applicant specifically traversed the taking of Official Notice on November 9 2009, so the argument that Appellant cannot argue it here is inapplicable. Appellant's brief points out that the Official Notice was further defective because it addressed something different – account notifications, as opposed to account *modifications* as set out in claim 8. Despite his objections (pages 24 – 25) the Examiner Answer's does even not attempt to defend this inapposite citation and on this basis Appellant submits that the rejection is clearly in error.

For claim 14: the Examiner states that because Hastings shows filtering, then it must be a *collaborative* filtering or *corroborative* filtering algorithm. These again are specific terms of art that describe particular recommenders, and Applicant pointed out that they are not found in Hastings. The Examiner merely indicates that he believes items are recommended in Hastings, but does not explain how this would meet the requirements of a “collaborative” or “corroborative” filter.

For claim 18: the Examiner states that: “...applicant has again argued his position based on a piece of prior art that is not of record and that has never been considered by the Examiner.” This argument seems incongruous given that the Examiner is the one who cited the Columbia House Records subscription program against claim 18 in the Answer at page 11:

For claim 18, not disclosed is that the queue replenishment rules ensure that there is always at least one item in the subscriber queue. This is in essence ensuring that the customer always has at least one movie in their queue. One of ordinary skill in the art recognizes that good customer service is good for business. The examiner takes "official notice" of the fact that it is well known for music delivery companies to automatically send a selection to a subscriber on a monthly basis, so that they receive something each month. When one enters into a subscription with a mail delivery music service, they agree to purchase a certain number of selections (e.g. music albums), and each month the subscriber can be sent a selection without their input. Columbia House is known to have done this for music titles and Time Life is known to have done this for a book subscription club many years ago, and in reality this has been done for decades.

The Examiner was the first to put the substance of the "Columbia House" prior art at issue here by citing it directly against claim 18. The implication that he did not cite or consider it therefore is directly at odds with his statements and evidence of record.

As with the aforementioned Acid Rain articles, therefore Applicant is entitled to present the best evidence on the actual scope and teachings of this reference, and whether it supports the Official Notice argued by the Examiner. Here the Applicant rightfully pointed out that the Examiner was considering only part of the teachings of this "subscription" club, and that these prior art schemes in fact required the user to buy at least one title every month, whether they wanted it or not. This is natural for a club that makes money from selling titles, but is inconsistent with Hastings which is relying on a fixed rental fee for a certain number of movies within a certain period. In other words, every movie Hastings sends to users costs the latter money and generates no additional sales revenue as was done in the prior music subscription programs. Hence, the analogy does not work because the two businesses operate entirely differently. The Examiner does not address these incongruencies in the Answer, confirming that the proposed combination is not sound.

For claims 21, 23, 24 and 26: the Examiner does not contest that this language effectively creates a conditional limitation which is entirely appropriate for similar reasons as set out in Ex Parte Tuli (Appeal 2009-004832) July 8 2010. He appears to be arguing that the language:

...said first user's capacity *can be allocated* to said second user *on a temporary basis*

is not connected to any structure, which is plainly not true. Claim 21 depends from claim 1, and the "capacity" is identified quite clearly as that of a list maintained on the computing system for "titles out" to the user. The capacity therefore in claim 21 is directly linked to this list structure on the computing system. Moreover considered as an additional restriction on the process of claim 1, this limitation again indicates a *temporal capability* constraint on the capacity exchange, which cannot be ignored.

As for claims 22, 25, Applicant pointed out that the Examiner was ignoring the fact that he did not show that the "queue replenishment control rules" also "... include instructions provided by the first user concerning email notifications." The Examiner merely noted that one using Hastings must sign up for instructions on "how the system will work." But this vague term and could refer to anything, and does not inherently mean that the users could control how email notifications are specifically tied to queue replenishment control rules.

- **Claims 11, 14 – 20 and 24 – 26 Pass The Requirements of §101**

First, a point of clarification: the Examiner implies on page 28 that he has made a §112 rejection in this case. A review of the record can confirm that this is not accurate.

The Examiner's main rejection, as set out in his Answer, basically follows this logic – the claims include the term "computer readable medium" and this is argued to be broad enough to cover signals. Therefore by the Examiner's rationale claim 11 covers software alone and is not statutory. See page 28.

Applicant submits that the Examiner's main error is that he has fixated on certain language to the exclusion of everything else in the claim, and from these words alone determined that the claim fails. Applicant maintains that the Examiner cannot examine these words in a vacuum, or determine that the presence of these words by themselves

automatically causes a claim to fail under §101. To reiterate, claim 11 recites (emphasis added):

A **media rental service system** for distributing playable media items to a user, the system comprising:

- (a) a **first user preference routine embodied in a computer readable medium and executing on a computing system** for capturing first user preference data from the first user during a first data session, said first user preference data including queue replenishment options; wherein said queue replenishment control rules are specified at least in part by said first user;
- (b) a **first user selection routine embodied in a computer readable medium and executing on the computing system for storing titles of one or more playable media items in a first user selection queue;**
- (c) a **first user queue replenishing routine embodied in a computer readable medium and executing on the computing system** and configured for updating title selections in said first user selection queue in accordance with said queue replenishment options; wherein said first user queue replenishing routine optionally automatically selects titles and modifies titles in said first user selection queue without additional first user input;
- (d) a **first user delivery routine embodied in a computer readable medium and executing on the computing system** and configured **for automatically moving a playable media item out of said first user selection queue and into a separate first titles out list for said first user with said computing system** when such item is delivered to the first user; wherein said **first titles out list has a first capacity used by said computing system** to constrain the first user to a limit of N titles which can be deployed to such user at one time;
- (e) an **exchange routine embodied in a computer readable medium and executing on the computing system** and configured for reducing said first capacity of said first titles out list with said computing system in response to a request of said first user, so as to increase a second capacity of a second separate user's second titles out list...

Applicant submits that even in light of the presence of the “computer readable medium” language, there is ample physical structure identified in the claim to render it statutory. The Examiner is improperly using some kind of litmus test that is disconnected from considering the claim as a whole. To address the Examiner’s points:

1) the Examiner argues that this case is different from the cited Ex Parte Goldberg case, because in the latter situation the claim recited a “processor,” while the present claim 11 recites a “computing system.” Applicant submits that this effectively a hollow distinction, and the Examiner does not explain or suggest why the first term

connotes a physical structure, but the latter somehow does not. There is simply no reason why the claim in Goldberg passes muster under §101, but the above claim does not.

2) the Examiner continues to maintain that simply because a claim reciting a physical structure (a computing system) also recites that it uses computer routines, this somehow transforms the claim into unpatentable subject matter under §101. The Examiner does not cite any authority for this proposition, and Applicant submits that it is not well founded. Much of the rest of the Examiner's analysis again relies heavily on personal opinion/conjecture and not substantive evidence or case authority. The Examiner states that he "...has a problem with this interpretation" – i.e., that the claim isn't necessarily nonstatutory but he fails to cite a single case to support his position.

3) In addition to Goldberg, several other cases by this panel dealing with this issue suggest that the claim is entirely acceptable as formulated, and clearly defines statutory subject matter.

a) For example, in Ex parte Gilgen et al. Appeal 2009-002901 (application 10/723,9791) December 22, 2009 the Honorable Board found (emphasis added)

In any case, we agree with Appellants that the claimed **"data store" must be interpreted as apparatus since software by itself is incapable of storing anything.** The Examiner has not argued a claim interpretation that would suggest otherwise. **Appellants have shown error in the conclusion that the claims are directed to software per se.**

Claim 11 here similarly indicates (limitation b) that the computing system is configured for **"storing titles of one or more playable media items in a first user selection queue."** In addition, the claim notes that the "list" has a certain capacity, which again denotes some form of physical structure. Given that the Ex Parte Gilgen panel deemed that software alone is "incapable of storing anything" Applicant submits that the present claims similarly cannot be software alone.

b) in Ex parte Brown, Appeal 2009-012201, Application 09/810,334 the Board held (emphasis added):

Claim 1 **recites a server** comprising a questionnaire generator, a database, and a profile generator. We agree with the Appellant that **the Examiner only found that the server might contain software.** Reply Br. 4. **A server is a device and as such is more than software per se.**

Again, this is similar to the present situation, in that the Examiner only finds here that the software “might” cover signals alone. If the Honorable Board has deemed that a “server” is a device that is much more than just software per se, then it should similarly hold that the “computing device” set out in claim 10 fits the same bill. Similarly, the “queue” described in claim 11 has a capacity, which means that it must refer to a physical storage of some kind.

c) In Ex Parte Chan the Honorable Board reviewed a claim that has even more common features with claim 11, in that it recited a system that was configured to perform various operations (as is the present claim 11). The Examiner contended that claim 1 (reproduced below) did not meet § 101:

1. A system for performing query operations, the system comprising:

- a base table having a plurality of spatial objects;
- an index table that comprises a plurality of data entries, the plurality of data entries being associated with the plurality of spatial objects;
- a module adapted to perform a query operation on the index table, the module configured to:
 - convert a query window into a plurality of values;
 - create a scan range for each of the plurality of values with a begin range value and an end range value from the plurality of values, wherein the scan range includes a stop condition;
 - scan the plurality of data entries for each of the scan ranges to identify one of the end range value and the stop condition; and
 - return a result based upon the plurality of data entries that are within the scan range for each of the plurality of values.

The Board overruled and noted (emphasis added);

Independent claim 1 recites in relevant part, a system comprising **an index table and a module for performing a query operation** thereon...Appellant’s

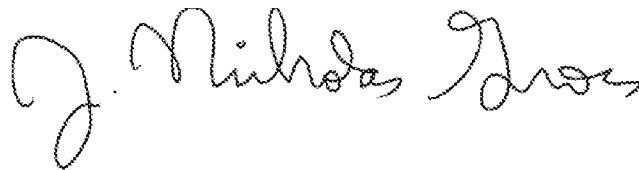
Specification reveals that the system includes inter alia a module, which may be a DBMS....**We find that a DBMS ordinarily involves the use of a computing device for managing data in a database.** Consequently we find that find that the system entails the use of a processing device programmed or configured to perform the various operations recited in the claim. **We thus find the claimed system to be a machine, which is one of the four statutory classes of subject matter.**

The Chan decision is particularly instructive for several reasons. First, the BPAI did reject claims 21 – 23 under §101, precisely because they *only* recited a computer readable medium which contained certain code. But it expressly found that claim 1 satisfied §101, as it was a “computing device” and thus a machine, even if it used software modules that performed certain operations.

Second the claim in Chan did not even explicitly recite the “computing device” language, unlike the present case where the term “computing system” is presented directly in the claim. Consequently Appellant submits that claim 11 is even further removed from the realm of non-statutory subject matter.

In brief, Applicant submits that several decisions of this Honorable Board, while not precedential per se, indicate that the clear perception of the kind of claim presented here is that it passes muster under §101 and is not covering just signals or software alone.

Respectfully submitted,



J. Nicholas Gross
Registration No. 34,175
Attorney for Applicant(s)

February 23, 2011
P.O. Box 9489
Berkeley, CA 94709
510-540-6300; 510-540-6315 (fax)